(6) (6)

Nos. 03-1293 & 03-1294

Supreme Court, U.S.
FILED
AUG 25 2004
OFFICE OF THE CLERK

In The Supreme Court of the United States

DAVID WHITFIELD,

Petitioner,

v.

UNITED STATES OF AMERICA

HAYWOOD EUDON HALL,

Petitioner,

v.

UNITED STATES OF AMERICA

On Writs Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF FOR PETITIONERS

RICHARD WARE LEVITT
Counsel of Record – Whitfield
LAW OFFICES OF RICHARD LEVITT
148 East 78th Street
New York, NY 10021
(212) 737-0400

SHARON C. SAMEK
Counsel of Record – Hall
LAW OFFICES OF SHARON SAMEK
8766 Ashworth Drive
Tampa, FL 33647
(813) 973-0260

THOMAS C. GOLDSTEIN
AMY HOWE
GOLDSTEIN & HOWE, P.C.
4607 Asbury Place, NW
Washington, DC 20016

PAMELA S. KARLAN
559 Nathan Abbott Way
Stanford, CA 94305

August 25, 2004

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Is commission of an overt act an element of the crime of conspiracy to commit money laundering under 18 U.S.C. 1956(h)?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
BRIEF FOR PETITIONERS	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	8
ARGUMENT	10
I. THE GENESIS, LANGUAGE, LEGISLATIVE HISTORY, AND STATUTORY STRUCTURE OF THE MONEY LAUNDERING LAWS ALL DEMONSTRATE THAT COMMISSION OF AN OVERT ACT IS AN ESSENTIAL ELEMENT OF A MONEY LAUNDERING CONSPIRACY	10
A. It is undisputed that before Section 1956(h) was enacted, a conviction for money laundering conspiracy required proof of an overt act	10
B. Congress enacted Section 1956(h) solely to increase the penalty for money laundering conspiracies	11
C. Section 1956's structure further confirms that Section 1956(h) was intended solely to increase the penalty for money laundering conspiracies	15

TABLE OF CONTENTS – Continued

	Page
II. NOTHING IN THIS COURT'S DECISION IN *UNITED STATES V. SHABANI* UNDERMINES THE CONCLUSION THAT CONSPIRACY TO LAUNDER MONEY REQUIRES PROOF OF AN OVERT ACT	17
III. CONGRESS MANIFESTED ITS INTENT TO REQUIRE PROOF OF AN OVERT ACT IN MONEY LAUNDERING CONSPIRACY PROSECUTIONS WHEN IT ENACTED THE MONEY LAUNDERING VENUE PROVISION, 18 U.S.C. 1956(i)	24
IV. REQUIRING AN OVERT ACT FOR MONEY LAUNDERING CONSPIRACY PROSECUTIONS SERVES IMPORTANT GOALS WHILE NOT INHIBITING MERITORIOUS PROSECUTIONS	28
V. ANY AMBIGUITY IN SECTION 1956(h) SHOULD TRIGGER THE RULE OF LENITY AND INCORPORATE THE COMMISSION OF AN OVERT ACT AS AN ESSENTIAL ELEMENT IN A PROSECUTION FOR CONSPIRACY TO COMMIT MONEY LAUNDERING	33
CONCLUSION	36

TABLE OF AUTHORITIES

Page

CASES

Almendarez-Torres v. *United States*, 523 U.S. 224 (1998) 14, 15
Baggett v. *Bullitt*, 377 U.S. 360 (1964) 32
Bailey v. *United States*, 516 U.S. 137 (1995) 21
Ewing v. *United States*, 386 F.2d 10 (CA9 1967) 18
Hibbs v. *Winn*, 124 S. Ct. 2276 (2004) 28
Holloway v. *United States*, 526 U.S. 1 (1999) 22
Jones v. *United States*, 526 U.S. 227 (1999) 28
Liparota v. *United States*, 471 U.S. 419 (1985) 35
Nash v. *United States*, 229 U.S. 373 (1913) 19
Perrin v. United States, 444 U.S. 37 (1979) 34
Poliafico v. *United States*, 237 F.2d 97 (CA6 1956) 18
Ratzlaf v. *United States*, 510 U.S. 135 (1994) 21
Rewis v. *United States*, 401 U.S. 808 (1971) 35
Salinas v. *United States*, 522 U.S. 52 (1997) 23
Scarborough v. *United States*, 431 U.S. 563 (1977) 19
Singer v. *United States*, 323 U.S. 338 (1945) 19
Taylor v. *United States*, 495 U.S. 575 (1990) 28, 31, 34
United States v. *Ahmad*, 974 F.2d 1163 (CA9 1992) 10
United States v. *Bey*, 736 F.2d 891 (CA3 1984) 17
United States v. *Booker*, No. 04-104 (cert. granted Aug. 2, 2004) 7
United States v. *Brown*, 972 F.2d 1380 (CA9 1992) 11
United States v. *Cabrales*, 524 U.S. 1 (1998) 24

TABLE OF AUTHORITIES – Continued

Page

United States v. *Conley*, 37 F.3d 970 (CA3 1994) 26
United States v. *Costa*, 953 F.2d 753 (CA2 1992) 10
United States v. *De Jesus*, 520 F.2d 298 (CA3 1975) 17
United States v. *De Viteri*, 350 F. Supp. 550 (E.D.N.Y. 1972) 18
United States v. *Emerson*, 128 F.3d 557 (CA7 1997) 26, 33
United States v. *Evans*, 272 F.3d 1069 (CA8 2001), cert. denied, 535 U.S. 1029 (2002) 26, 32
United States v. *Fanfan*, No. 04-105 (cert. granted Aug. 2, 2004) 7
United States v. *Franklin*, 902 F.2d 501 (CA7 1990) 10
United States v. *Fuller*, 974 F.2d 1474 (CA5 1992) 11
United States v. *Gardner*, 202 F. Supp. 256 (N.D. Cal. 1962) 18
United States v. *Gilliam*, 975 F.2d 1050 (CA4 1992) 10
United States v. *Godwin*, 272 F.3d 659 (CA4 2001) 32
United States v. *Granderson*, 511 U.S. 39 (1994) 35
United States v. *Hildebrand*, 152 F.3d 756 (CA8), cert. denied, 525 U.S. 1033 (1998) 26, 33
United States v. *Isabel*, 945 F.2d 1193 (CA1 1991) 10
United States v. *Kelley*, 929 F.2d 582 (CA10 1991) 10
United States v. *Lee*, 991 F.2d 343 (CA6 1993) 26
United States v. *Long*, 977 F.2d 1264 (CA8 1992) 11
United States v. *Marsh*, 963 F.2d 72 (CA5 1992) 10
United States v. *McKenney*, 181 F. Supp. 143 (S.D.N.Y. 1959) 18

TABLE OF AUTHORITIES – Continued

Page

United States v. *Navarro*, 145 F.3d 580 (CA3 1993) 26

United States v. *O'Brien*, 972 F.2d 47 (CA3 1992) 32

United States v. *Payne*, 962 F.2d 1228 (CA6 1992) 10

United States v. *Pettigrew*, 77 F.3d 1500 (CA5 1996) 26

United States v. *Rodriguez*, 53 F.3d 1439 (CA7 1995) 26

United States v. *Ross*, 190 F.3d 446 (CA6), cert. denied, 528 U.S. 1033 (1999) 26, 32

United States v. *Shabani*, 513 U.S. 10 (1994) ..... *passim*

United States v. *Stavroulakis*, 952 F.2d 686 (CA2 1992) 11

United States v. *Tam*, 240 F.3d 797 (CA9 2001) 26

United States v. *Ursery*, 518 U.S. 267 (1996) 10

United States v. *Wells*, 519 U.S. 482 (1997) 33, 34

United States v. *Wilson*, 249 F.3d 366 (CA5 2001) 26

STATUTES

8 U.S.C. 1326 14

8 U.S.C. 1326(a) 15

8 U.S.C. 1326(b) 14

8 U.S.C. 1326(b)(2) 14, 15

18 U.S.C. 32 22

18 U.S.C. 32(a)(7) 20

18 U.S.C. 32(b)(4) 20

18 U.S.C. 37 22

TABLE OF AUTHORITIES – Continued

Page

18 U.S.C. 37(a) 20

18 U.S.C. 37(a)(3) 20

18 U.S.C. 115 22

18 U.S.C. 115(a)(1)(A) 20

18 U.S.C. 152 29

18 U.S.C. 175 22

18 U.S.C. 195(a) 21

18 U.S.C. 224(a) 20

18 U.S.C. 229(a)(2) 20

18 U.S.C. 371 ..... *passim*

18 U.S.C. 521(c)(3) 20

18 U.S.C. 521(d)(3)(D) 20

18 U.S.C. 541 29

18 U.S.C. 543(a)(1) 26

18 U.S.C. 658 29

18 U.S.C. 669 29

18 U.S.C. 793(g) 20

18 U.S.C. 794(c) 20

18 U.S.C. 831(a)(8) 20

18 U.S.C. 844 22

18 U.S.C. 844(m) 20

18 U.S.C. 844(n) 20

18 U.S.C. 875(d) 29

18 U.S.C. 892(a) 20

TABLE OF AUTHORITIES – Continued

	Page
18 U.S.C. 894(a)	20
18 U.S.C. 924(n)	20
18 U.S.C. 930(c)	20
18 U.S.C. 956	22
18 U.S.C. 956(a)(1)	20
18 U.S.C. 956(b)	20
18 U.S.C. 1029(b)(2)	21
18 U.S.C. 1037(a)(5)	21
18 U.S.C. 1117	21
18 U.S.C. 1201(c)	21
18 U.S.C. 1203	22
18 U.S.C. 1203(a)	21
18 U.S.C. 1341	6
18 U.S.C. 1365(e)	21
18 U.S.C. 1368(a)	21, 23
18 U.S.C. 1466(a)	21
18 U.S.C. 1466(b)	21
18 U.S.C. 1511(a)	21
18 U.S.C. 1512(i)	27
18 U.S.C. 1512(k)	21
18 U.S.C. 1513(e)	21
18 U.S.C. 1751(d)	21
18 U.S.C. 1752(b)	21
18 U.S.C. 1752(c)	27

TABLE OF AUTHORITIES – Continued

	Page
18 U.S.C. 1831(a)(5)	21
18 U.S.C. 1832(a)(5)	21
18 U.S.C. 1951(a)	21
18 U.S.C. 1956	*passim*
18 U.S.C. 1956(a)	15, 16
18 U.S.C. 1956(a)(1)	16
18 U.S.C. 1956(a)(2)	15, 16
18 U.S.C. 1956(a)(3)	16
18 U.S.C. 1956(c)	16
18 U.S.C. 1956(c)(7)	29, 30, 31
18 U.S.C. 1956(d)	16
18 U.S.C. 1956(e)	16
18 U.S.C. 1956(f)	16
18 U.S.C. 1956(g)	16
18 U.S.C. 1956(h)	*passim*
18 U.S.C. 1956(i)	2, 20, 24, 25
18 U.S.C. 1956(i)(2)	9, 27
18 U.S.C. 1957	*passim*
18 U.S.C. 1959(a)	21
18 U.S.C. 1959(d)	21
18 U.S.C. 1962(d)	23
18 U.S.C. 1992(c)	21
18 U.S.C. 1993(a)(8)	21
18 U.S.C. 2118(d)	21

TABLE OF AUTHORITIES – Continued

Page

18 U.S.C. 2153 21
18 U.S.C. 2154(b) 21
18 U.S.C. 2155(b) 21
18 U.S.C. 2251(e) 21
18 U.S.C. 2252(b)(1) 21
18 U.S.C. 2252(b)(2) 21
18 U.S.C. 2252A(b)(1) 21
18 U.S.C. 2252A(b)(2) 21
18 U.S.C. 2280 22
18 U.S.C. 2280(a)(1)(h) 21
18 U.S.C. 2281 22
18 U.S.C. 2281(a)(1)(F) 21
18 U.S.C. 2332a(a)(3) 29
18 U.S.C. 2332b(a)(2) 21
18 U.S.C. 2332(b) 21
18 U.S.C. 2332(f)(a)(2) 21
18 U.S.C. 2339B(a)(1) 21
18 U.S.C. 2339C(a)(2) 21
18 U.S.C. 2340A(c) 21
18 U.S.C. 2388(b) 21
18 U.S.C. 2423(e) 21
18 U.S.C. 3235 27
18 U.S.C. 3565 35
21 U.S.C. 846 ..... 7, 9, 17

TABLE OF AUTHORITIES – Continued

Page

28 U.S.C. 1254(1) 1
Annunzio-Wylie Anti-Money Laundering Act, Pub. L. No. 102-550, 106 Stat. 4044 ..... 13, 26
Ariz. Rev. Stat. Ann. § 13-1003(A) (West 1978) 31
Boggs Act of 1951, Pub. L. No. 82-255, 65 Stat. 767 17
Comprehensive Deposit Insurance Reform and Taxpayer Protection Act, S. 543, 102d Cong. (1991) 11
Currency and Foreign Transactions Reporting Act (Bank Secrecy Act), Pub. L. No. 91-508, tit. II, 84 Stat. 1114 3
Federal Housing Enterprises Regulatory Reform Act, S. 2733, 102d Cong. (1992) 11
Financial Institutions Enforcement Improvements Act, H.R. 6048, 102d Cong. (1992) 13
Money Laundering Control Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 3
Money Laundering Improvements Act of 1991, S. 1241, 102d Cong. (1991) 11
Money Laundering Prosecution Improvements Act of 1988, Pub. L. No. 100-690, § 6465, 102 Stat. 4354 15
Omnibus Crime Act, S. 1970, 101st Cong. (1990) 11
Pub. L. No. 102-550, § 530, 106 Stat. 3672 (1992) .. 4, 11, 14
Pub. L. No. 103-322, § 330019(a)(2), 21 Stat. 2149 (1994) 4
Pub. L. No. 103-325, 108 Stat. 2243 (1994) 26
Pub. L. No. 104-132, 110 Stat. 1301 (1996) 26

TABLE OF AUTHORITIES – Continued

Page

Pub. L. No. 104-191, 110 Stat. 2018 (1996) 26
Pub. L. No. 104-294, 110 Stat. 3499 (1996) 26
Pub. L. No. 106-569, 114 Stat. 3018 (2000) 26
Pub. L. No. 107-56, § 1004, 115 Stat. 392 (2001)..... 24, 25
Pub. L. No. 91-513, § 406, 84 Stat. 1265 (1970) 18
Utah Code Ann. § 76-4-201 (1974)..... 31

OTHER AUTHORITIES

136 Cong. Rec. S6639 (daily ed. May 21, 1990).... 12, 18, 19
137 Cong. Rec. H4203 (daily ed. June 10, 1991) 12
137 Cong. Rec. S12,235 (daily ed. Aug. 2, 1991) 13, 18, 19
138 Cong. Rec. H9802 (daily ed. Sept. 29, 1992)..... 12, 14
2 Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law (2d ed. 2003)..... 31, 32
Conference Report, 102d Congress, 138 Cong. Rec. S17,904 (daily ed. Sept. 30, 1992)..... 4, 14
Developments in the Law of Criminal Conspiracy, 72 Harv. L. Rev. 922 (1959)..... 32
H.R. Rep. 104-383 (1995) 23
H.R. Rep. No. 82-635 (1951)..... 18
Kelly Neal Carpenter, *Money Laundering*, 30 Am. Crim. L. Rev. 813 (1993)..... 3
Mariano-Florentino Cuellar, *The Tenuous Relationship Between the Fight Against Money Laundering and the Disruption of Criminal Finance*, 93 J. Crim. L. & Criminology 311 (2003)..... 3

TABLE OF AUTHORITIES – Continued

Page

Paul Marcus, Prosecution and Defense of Criminal Conspiracy Cases § 2.08(3) (1987)..... 30
Rachael Simonoff, Ratzlaf v. United States: *The Meaning of "Willful" and the Demands of Due Process*, 28 Colum. J.L. & Soc. Probs. 397 (1995)..... 3
S. Rep. No. 82-1051 (1951)..... 18
The 21st Century Law Enforcement, Crime Prevention and Victims Assistance Act, S. 16, 107th Cong. (2001)..... 24
The Laundering Enforcement and Combating Drugs in Prisons Act of 1998, S. 2011, 105th Cong. 24
The Money Laundering Deterrence Act of 1998, H.R. 4005, 105th Cong. 24
U.S.S.G. 3B1.3..... 7

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 349 F.3d 1320. Petitioner Hall's judgment of conviction on remand from the Eleventh Circuit appears in the joint appendix at page 26. Petitioner Whitfield's judgment of conviction is appended to his petition for certiorari at App. 6-17. The ruling of the district court is unpublished and appears in the joint appendix at pages 19-21.

JURISDICTION

The judgment of the court of appeals was entered on November 10, 2003. Petitioner Whitfield filed his petition for writ of certiorari on March 5, 2004. Petitioner Hall filed his petition for writ of certiorari on March 10, 2004. This Court granted certiorari on June 21, 2004, and has jurisdiction to consider this matter pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 18, Section 1956(h) provides:

> Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

Title 18, Section 1956(i) provides:

(i) Venue.

(1) Except as provided in paragraph (2), a prosecution for an offense under this section or section 1957 may be brought in –

(A) any district in which the financial or monetary transaction is conducted; or

(B) any district where a prosecution for the underlying specified unlawful activity could be brought, if the defendant participated in the transfer of the proceeds of the specified unlawful activity from that district to the district where the financial or monetary transaction is conducted.

(2) A prosecution for an attempt or conspiracy offense under this section or section 1957 may be brought in the district where venue would lie for the completed offense under paragraph (1), or in any other district where an act in furtherance of the attempt or conspiracy took place.

(3) For purposes of this section, a transfer of funds from 1 place to another, by wire or any other means, shall constitute a single, continuing transaction. Any person who conducts (as that term is defined in subsection (c)(2)) any portion of the transaction may be charged in any district in which the transaction takes place.

STATEMENT OF THE CASE

The question presented by this case is whether commission of an overt act is an element of the crime of

conspiracy to launder money under 18 U.S.C. 1956 and 1957. The answer to that question is "yes," based on the nature of the underlying offense, the legislative history, and the statutory structure of the federal money laundering statutes.

1. The Money Laundering Statutes, 18 U.S.C. 1956 and 1957

Money laundering, in its generic sense, is the process by which a person attempts to disguise the criminal origin of money through one or more financial transactions. Until 1970, money laundering activities were neither controlled nor prohibited by federal statute or common law.[1]

In 1970, Congress enacted the first statute directed at money laundering, the Currency and Foreign Transactions Reporting Act (Bank Secrecy Act), Pub. L. No. 91-508, tit. II, 84 Stat. 1114. The 1970 Act required individuals and financial institutions to comply with a variety of reporting requirements. Congress thereafter passed the Money Laundering Control Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207, now codified at 18 U.S.C. 1956 and 1957. The 1986 Act created new substantive offenses related to financial transactions that involved the proceeds of specified illegal activity.[2]

---

[1] *See* Kelly Neal Carpenter, *Money Laundering*, 30 Am. Crim. L. Rev. 813, 814-15 (1993); Rachael Simonoff, Ratzlaf v. United States: *The Meaning of "Willful" and the Demands of Due Process*, 28 Colum. J.L. & Soc. Probs. 397, 409 (1995).

[2] For a general discussion of the statutes, *see* Mariano-Florentino Cuellar, *The Tenuous Relationship Between the Fight Against Money Laundering and the Disruption of Criminal Finance*, 93 J. Crim. L. & Criminology 311 (2003).

In its original form, the Act did not contain its own conspiracy provision, but rather relied on the general federal conspiracy statute, 18 U.S.C. 371. The maximum penalty for conviction under Section 371 – for conspiracy to launder money, or for any other conspiracy – was five years imprisonment.

In 1992, as part of the Annunzio-Wylie Anti-Money Laundering Act, Pub. L. No. 102-550, 106 Stat. 4044,[3] Congress enacted the provision now codified in 18 U.S.C. 1956(h)[4] governing conspiracies:

> Any person who conspires to commit any offense defined in this section or section 1957 shall be subject to the same penalties as those prescribed for the offense the commission of which was the object of the conspiracy.

As set forth in the conference report, the exclusive purpose of the provision was to "increase[] the penalty for the offense of conspiracy to commit money laundering under 19 [sic] U.S.C. 1956 or 1957 to the penalty for the substantive money laundering offense."[5]

In 2001, as part of the USA PATRIOT Act, Congress amended the money laundering laws in one additional way relevant to this case. In Section 1004 of the USA PATRIOT

[3] The Act also provided new procedures for civil forfeitures, expanded on the specified unlawful activities and financial transactions covered by 18 U.S.C. 1956 and 1957, and created some additional reporting requirements.

[4] Initially codified at Section 1956(g), it was subsequently corrected to Section 1956(h) by Pub. L. No. 103-322, § 330019(a)(2), 21 Stat. 2149 (1994).

[5] Conference Report, 102d Congress, 138 Cong. Rec. S17,904 (daily ed. Sept. 30, 1992).

Act, Congress enacted a specific money laundering venue provision, Section 1956(i), which lays venue for conspiracy prosecutions in the district where venue would lie for the completed offense or in any other district where an act in furtherance of the attempt or conspiracy took place.

2. Course of Proceedings Below

On March 12, 1999, petitioners Hall and Whitfield, along with five co-defendants, were arrested and charged in a multi-count indictment with a variety of criminal offenses stemming from their involvement in the Greater Ministries International Church ("GMIC"). GMIC operated and promoted the Faith Promises Program, which the government alleged to be a fraudulent investment program. J.A. 1-18.

Count One of the indictment charged the defendants with conspiring to commit mail fraud and wire fraud and transporting property taken by fraud across state lines in violation of 18 U.S.C. 371. J.A. 1-9.

Count Two, the count in question here, alleged a conspiracy to commit money laundering in violation of 18 U.S.C. 1956(h). This count incorporated by reference Count One's introductory material and the description of the "manner and means" by which the conspiracy was carried out, but it conspicuously failed to incorporate the overt acts set out in Count One or to allege any other overt acts in furtherance of the money laundering conspiracy. J.A. 9-10.

Counts Three through Seven charged the parties with committing mail fraud based on five acts of mailing newsletters, statements of accounts, and U.S. currency to

participants in the Faith Promises Program in violation of 18 U.S.C. 1341. J.A. 11-12.

Counts Eight through Twelve charged the parties with money laundering offenses based on five check-cashing transactions in violation of 18 U.S.C. 1957. J.A. 12-13. Counts Thirteen through Seventeen charged the parties with engaging in five unlawful monetary transactions based on five separate check-cashing transactions. J.A. 14-15.

At the close of the evidence, counsel for petitioners asked the district court to instruct the jurors that they could convict the defendants under Section 1956(h) only if they found that an overt act in furtherance of the alleged money laundering conspiracy had been committed. The court rejected this request, instead instructing the jury that the only two elements they needed to find to convict petitioners of money laundering conspiracy were, "[f]irst, that two or more persons, in some way or manner, came to a mutual understanding to try to accomplish a common and unlawful plan, as charged in the indictment; and [s]econd, that the defendant under consideration knowingly and willfully became a member of such conspiracy." J.A. 22-25.

The judge directed a verdict of "not guilty" as to all defendants on Count Five.

The jury convicted petitioner Whitfield of all remaining counts.

The jury convicted petitioner Hall of Counts One (conspiracy to commit mail fraud), Two (conspiracy to commit money laundering), Four, Six, and Seven (mail fraud counts). The jury acquitted petitioner Hall of every

money laundering and unlawful monetary transaction with which he was charged – Counts Eight through Seventeen – as well as Count Three (mail fraud). J.A. 26-27.

Petitioner Whitfield[6] was sentenced to 235 months' imprisonment, followed by thirty-six months of supervised release. Petitioner Hall was sentenced to 185 months' imprisonment, sixty-five months of which was attributable to the conviction for conspiracy to launder money, followed by thirty-six months of supervised release.

On appeal, petitioner Hall claimed legal error in the district court's failure to instruct the jury that commission of an overt act is an essential element of a money laundering conspiracy under Section 1956(h). Petitioner Whitfield adopted Hall's argument. Petitioner Hall also appealed his two-level sentencing enhancement under U.S.S.G. 3B1.3 for abusing a position of trust. The Eleventh Circuit agreed that the enhancement was in error and remanded the case to the district court for re-sentencing,[7] but it rejected petitioners' arguments regarding the elements of Section 1956(h). It held that Section 1956(h) was analogous to 21 U.S.C. 846, a drug conspiracy statute that this Court had held requires no proof of an overt act, *see United States* v. *Shabani*, 513 U.S. 10 (1994), and on that

[6] Both petitioners objected to various other sentencing enhancements before the district court, including the amount of loss, role in the offense, and sophisticated means enhancements. However this Court rules on the question presented specifically by this case, we ask that this Court dispose of this case consistent with its decisions in *United States* v. *Booker*, No. 04-104 (cert. granted Aug. 2, 2004), and *United States* v. *Fanfan*, No. 04-105 (cert. granted Aug. 2, 2004).

[7] On March 19, 2004, petitioner Hall was re-sentenced to serve 137 months in prison followed by 36 months of supervised release.

basis affirmed petitioners' convictions, concluding that "an overt act is not an essential element for conviction of conspiracy to commit money laundering." Pet. App. 7a.

This Court subsequently granted certiorari. *See* 124 S. Ct. 2872 (2004).

SUMMARY OF ARGUMENT

There is no dispute that, prior to 1992, conspiracy to launder money required commission of an overt act. The only question is whether, in enacting Section 1956(h) to enhance the penalties for money laundering conspiracies, Congress intended to eliminate this pre-existing requirement. The statute's structure, purpose, and legislative history all confirm that the enactment of Section 1956(h) was not intended to eliminate the overt act requirement that had applied to money laundering conspiracies when they were prosecuted under 18 U.S.C. 371, a requirement that had been uniformly and repeatedly applied to money laundering conspiracy prosecutions.

At the time Congress enacted Section 1956(h), it was well aware that money laundering conspiracy prosecutions required the commission of an overt act. If Congress had meant to change this well-established practice, it would have done so explicitly.

After the enactment of Section 1956(h), the overwhelming majority of courts continued to require the commission of an overt act in money laundering conspiracy prosecutions, and this majority view continued to prevail even after this Court's decision in *United States* v. *Shabani*, 513 U.S. 10 (1994). When Congress enacted a

series of other amendments to the money laundering statutes, it did nothing to disapprove the majority view. To the contrary, in 2001, when Congress enacted new venue provisions for money laundering cases, it expressly incorporated the overt act element in the provision regarding conspiracy prosecutions, 18 U.S.C. 1956(i)(2).

In holding that no overt act is required for a conviction for conspiracy to commit money laundering, the Eleventh Circuit relied on this Court's decision in *Shabani*. That decision, however, is inapposite because of critical differences between Section 1956(h) and 21 U.S.C. 846, the drug conspiracy statute at issue in *Shabani*. The structure, purpose, and history of the drug conspiracy statute differ significantly from those of the money laundering conspiracy statute. Prior to the enactment of Section 846, drug conspiracy prosecutions did not invariably require the commission of an overt act; prior to the enactment of Section 1956(h), money laundering conspiracies *always* required an overt act. Moreover, Congress intended to create a "specific offense" when it enacted Section 846, rather than a "penalty" provision as it did with Section 1956(h).

Further, *Shabani* was decided two years after the enactment of Section 1956(h); as such, Congress cannot be expected to have anticipated that language that had previously required the commission of an overt act would no longer be so interpreted. Finally, and unlike the case with respect to Section 846, Congress implicitly ratified the majority view requiring an overt act in money laundering conspiracy prosecutions by incorporating an overt act requirement into the venue provision it passed in 2001, while expressing no disapproval of the prevailing rule. To the extent there is any ambiguity in the meaning of

Section 1956(h), the rule of lenity dictates that the ambiguity must be resolved in petitioners' favor, and Section 1956(h) should be interpreted to require the commission of an overt act as an essential element of the offense.

ARGUMENT

I. THE GENESIS, LANGUAGE, LEGISLATIVE HISTORY, AND STATUTORY STRUCTURE OF THE MONEY LAUNDERING LAWS ALL DEMONSTRATE THAT COMMISSION OF AN OVERT ACT IS AN ESSENTIAL ELEMENT OF A MONEY LAUNDERING CONSPIRACY.

A. It is undisputed that before Section 1956(h) was enacted, a conviction for money laundering conspiracy required proof of an overt act.

Prior to the passage of Section 1956(h) in 1992, the commission of an overt act was a necessary element of the crime of money laundering conspiracy. Under the Money Laundering Control Act of 1986, money laundering conspiracies were prosecuted under 18 U.S.C. 371, the general federal conspiracy statute. *See, e.g.*, *United States* v. *Ursery*, 518 U.S. 267, 271 (1996); *United States* v. *Gilliam*, 975 F.2d 1050, 1052 (CA4 1992); *United States* v. *Ahmad*, 974 F.2d 1163, 1164 (CA9 1992); *United States* v. *Marsh*, 963 F.2d 72, 73 (CA5 1992); *United States* v. *Payne*, 962 F.2d 1228, 1229 (CA6 1992); *United States* v. *Costa*, 953 F.2d 753, 755 (CA2 1992); *United States* v. *Isabel*, 945 F.2d 1193, 1195 (CA1 1991); *United States* v. *Kelley*, 929 F.2d 582, 583 (CA10 1991); *United States* v. *Franklin*, 902 F.2d 501, 504 (CA7 1990). Because Section 371 contains an express overt act requirement, the courts of appeals

uniformly required proof of an overt act for money laundering conspiracies. *See, e.g.*, *United States* v. *Brown*, 972 F.2d 1380, 1381 (CA9 1992); *United States* v. *Long*, 977 F.2d 1264, 1266 (CA8 1992); *United States* v. *Fuller*, 974 F.2d 1474, 1476 (CA5 1992); *United States* v. *Stavroulakis*, 952 F.2d 686, 688 (CA2 1992).

B. Congress enacted Subsection 1956(h) solely to increase the penalty for money laundering conspiracies.

The legislative history surrounding the enactment of Section 1956(h) demonstrates that the sole purpose of Section 1956(h) was to increase the penalties for money laundering conspiracies. Congress did not intend to disturb the long-standing requirement that an overt act be proven as an element of the crime of conspiracy to commit money laundering.

Section 1956(h) was passed in 1992 as part of the Annunzio-Wylie Anti-Money Laundering Act, Pub. L. No. 102-550, 106 Stat. 4044. Prior to its enactment, Congress had repeatedly considered increasing the penalty for money laundering conspiracies. Amendments to increase the penalty for money laundering conspiracies were considered by the Senate in the Omnibus Crime Act, S. 1970, 101st Cong. (1990); the Money Laundering Improvements Act of 1991, S. 1241, 102d Cong. (1991); the Money Laundering Improvements Act of 1991, S. 1665, 102d Cong.; the Comprehensive Deposit Insurance Reform and Taxpayer Protection Act, S. 543, 102d Cong. (1991); and the Federal Housing Enterprises Regulatory Reform Act, S. 2733, 102d Cong. (1992).

Similar efforts to increase the penalty for money laundering conspiracies were also considered by the House of Representatives. Indeed, the earlier bill on which the Annunzio-Wylie Act's money laundering conspiracy provision was based, *see* 138 Cong. Rec. H9802 (daily ed. Sept. 29, 1992) (statement of Rep. Annunzio), addressed the penalty for money laundering conspiracies simply by amending the general federal conspiracy statute to add a new subsection to 18 U.S.C. 371. That new section would have provided:

> (c) Punishment in Case of Conspiracy to Commit a Money Laundering Offense. – Notwithstanding the maximum punishment provided in subsection (a), if the offense, the commission of which is the object of the conspiracy, is an offense under section 1956 or 1957, the person conspiring to commit such offense shall be subject to the same penalties as the penalties prescribed under such sections for the offense.

137 Cong. Rec. H4203 (daily ed. June 10, 1991) (introduction of Money Laundering Enforcement Amendments of 1991, H.R. 26, 102d Cong.). As a subsection of Section 371, the sole effect of H.R. 26 would have been to increase the penalty for money laundering conspiracies.[8] It would have

[8] Given the multitude of conspiracy statutes that Congress has enacted, both pre- and post- Section 1956(h), none of which has resulted in amendments to Section 371 (*see infra* n.13), it is apparent that Congress's decision not to address money laundering conspiracies in Section 371 simply reflects its consistent choice to instead enact crime-specific conspiracy provisions. The legislative history of these statutes indicates Congress's central purpose: to make conspiracies to commit various offenses punishable by the same maximum penalty that is applicable to the substantive offense that is the object of the conspiracy. *See, e.g.*, 136 Cong. Rec. S6639 (daily ed. May 21, 1990) (statement of

(Continued on following page)

left undisturbed Section 371's definition of the crime of conspiracy and thus clearly would have preserved Section 371's express overt act requirement.[9]

At no point in any of the discussions or debates on the various proposed amendments or during consideration of the Annunzio-Wylie Bill did any member of Congress discuss the overt act requirement in connection with the passage of a money laundering conspiracy provision. Rather, Congress focused exclusively on increasing the penalties for the pre-existing offense of conspiracy to launder money. The money laundering conspiracy provision of the Act was Section 310 of H.R. 6048, which was titled simply "Penalty for Money Laundering Conspiracies." The section-by-section analysis described the money laundering conspiracy provision as follows: "This section increases the penalty for the offense of conspiracy to commit money laundering under 19 [sic] U.S.C. 1956 or 1957 to the penalty for the substantive money laundering

Sen. Biden) (describing his proposed provision as "a technical amendment to make consistent the penalty for money laundering conspiracies with *penalties for drug conspiracies*, which carry the same penalty as the offense that is the object of the conspiracy" (emphasis added)); 137 Cong. Rec. S12,235 (daily ed. Aug. 2, 1991) (statement of Sen. D'Amato) (describing his proposed provision as "rais[ing] the penalty for money laundering conspiracy from 5 years to whatever the penalty would be for the substantive offense that was the object of the conspiracy"). Nothing in these discussions – which referred interchangeably to conspiracy statutes that contained overt act requirements and statutes that omitted them – suggests that in changing the penalties for various conspiracies, Congress also meant to change the pre-existing elements.

[9] In September 1992, the House again revisited the issue of increased penalties for money laundering conspiracies as part of the Financial Institutions Enforcement Improvements Act, H.R. 6048, 102d Cong. (1992), before its eventual enactment in the Annunzio-Wylie Anti-Money Laundering Act.

offense." 138 Cong. Rec. S17,904 (daily ed. Oct. 8, 1992). Consistent with the prior labeling of this provision, the session law containing the new Section 1956(h) was entitled "Penalty for Money Laundering Conspiracies." Pub. L. No. 102-550, § 530, 106 Stat. 3672, 4066 (1992). In summarizing the bill, Representative Wylie, one of its chief architects and drafters, explained that Section 310 "increases the criminal penalties for money laundering conspiracies." 138 Cong. Rec. H9802 (daily ed. Sept. 29, 1992).

The conclusion that Section 1956(h) did nothing more than increase the penalty for money laundering conspiracies, and therefore does not redefine the elements of the crime, parallels this Court's analysis of the penalties for illegal re-entry prescribed by 8 U.S.C. 1326(b), in *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998). There, the petitioner pled guilty to illegal re-entry in violation of Section 1326 and argued that his sentencing judge could not impose an enhanced sentence based on his previous conviction for an aggravated felony, as authorized by 8 U.S.C. 1326(b)(2), because the indictment had not alleged this previous conviction. This Court rejected the argument, concluding that Section 1326(b) merely dealt with penalties and did not affect the substantive elements of any crime. In reaching this conclusion, the Court relied on several factors: first, the title of the statute, "Criminal penalties for reentry of certain deported aliens"; second, the section-by-section analysis stating that the provision "[i]ncreases [the] current penalty for illegal re-entry"; and third, statements by various members of Congress regarding how the statute would increase penalties. *Id.* at 234; *see also* Br. for the U.S. at 15, *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998) (No. 96-6839) ("[t]he title

corroborates the congressional intent"); *id.* at 22 (section-by-section analysis); *id.* at 22-23 (statements by members of Congress). And the Court emphasized that "the legislative history * * * speaks about, and only about, the creation of new penalties. * * * The history, to our knowledge, contains no language at all that indicates Congress intended to create a new substantive crime." 523 U.S. at 234; *see also* Br. for the U.S. at 23, *Almendarez-Torres* ("The circumstances surrounding enactment of Section 1326(b)(2) thus provide every indication that Congress intended it to authorize increased penalties for certain Section 1326(a) offenders, not to constitute a free-standing offense. The history repeatedly refers to the new subsections as establishing 'increased penalties.'"). In this case, the same factors are present and should lead to the same conclusion: Congress did not change the elements of the offense of conspiracy to launder money, but instead only changed the penalty.

C. Section 1956's structure further confirms that Section 1956(h) was intended solely to increase the penalty for money laundering conspiracies.

When Congress first enacted Section 1956 as part of the Money Laundering Control Act of 1986, Section 1956 contained two offenses set forth in Sections 1956(a)(1) and 1956(a)(2). When an additional substantive offense was added to Section 1956 as part of the Money Laundering Prosecution Improvements Act of 1988, Pub. L. No. 100-690, § 6465, 102 Stat. 4354, 4375, it was placed in Section

1956(a) as well.[10] Thus, to the extent that Congress intended to create new offenses and define their elements, it chose to do so in Section 1956(a).

Under the money laundering statutory scheme in effect when Section 1956(h) was enacted, Subsections (a)(1)-(3) of Section 1956 delineated the prohibited money laundering activities; Section 1956(b) set forth the civil forfeiture and monetary penalties associated with Section 1956 violations; Section 1956(c) defined the terms used in Subsections (a)(1), (2), and (3), including what constitutes "specified unlawful activity"; Subsection (d) explained the relationship between Section 1956 and existing laws; Subsection (e) identified the different federal agencies authorized to investigate these money laundering offenses; Subsection (f) established extraterritorial jurisdiction over U.S. citizens outside the country and non-U.S. citizens inside the country; and Subsection (g) required financial institutions to report employees who have been found guilty of violating the money laundering statutes. Congress added the conspiracy provision as Subsection (h), establishing the same punishment for conspiracies as for the offense the commission of which was the object of the conspiracy.

If Congress had intended the money laundering conspiracy provision to be another substantive offense rather than simply an increased penalty provision, it would have once again amended Section 1956(a) to add a new paragraph prohibiting money laundering conspiracies.

[10] "Section 1956(a) of title 18, United States Code, is amended by inserting after paragraph (a)(2) the following new paragraph: [listing the provision that would be codified at 18 U.S.C. 1956(a)(3)]."

Instead, it placed the provision for increasing the penalty for money laundering conspiracies in an entirely different section of the statute, following various jurisdictional and procedural subsections. Thus, the structure of Section 1956 demonstrates that the sole purpose of Section 1956(h) was to increase the penalty for money laundering conspiracies, not to create a substantive conspiracy offense or to otherwise alter the long-standing overt act requirement.

II. NOTHING IN THIS COURT'S DECISION IN *UNITED STATES V. SHABANI* UNDERMINES THE CONCLUSION THAT CONSPIRACY TO LAUNDER MONEY REQUIRES PROOF OF AN OVERT ACT.

The Eleventh Circuit's decision in this case rested almost entirely on this Court's decision in *United States* v. *Shabani*, 513 U.S. 10 (1994), which held that 21 U.S.C. 846, a drug conspiracy statute, does not require proof of an overt act. But the differences between the statutory scheme at issue in this case and that in *Shabani* undercut the conclusion that *Shabani* is controlling here.

First, unlike Section 1956(h), Section 846 was not passed against a legal background in which an overt act was clearly a necessary element of the crime of drug conspiracy. Prior to the passage of the Comprehensive Drug Abuse Prevention and Control Act of 1970, which enacted Section 846, drug conspiracies had been penalized for nearly two decades under the Boggs Act of 1951, Pub. L. No. 82-255, 65 Stat. 767, which federal courts regularly construed as not containing an overt act requirement. *See, e.g.*, *United States* v. *Bey*, 736 F.2d 891, 894 (CA3 1984); *United States* v. *De Jesus*, 520 F.2d 298, 301 (CA3 1975)

(adopting the holding of *United States* v. *De Viteri*, 350 F. Supp. 550, 552 (E.D.N.Y. 1972)); *Ewing* v. *United States*, 386 F.2d 10, 15 (CA9 1967) (adopting the holding of *United States* v. *Gardner*, 202 F. Supp. 256, 258 (N.D. Cal. 1962)); but *see Poliafico* v. *United States*, 237 F.2d 97, 105 (CA6 1956) (listing, without discussion, commission of an overt act as an element of a drug importation conspiracy); *United States* v. *McKenney*, 181 F. Supp. 143, 146 (S.D.N.Y. 1959) ("The [Boggs Act] simply related to the matter of punishment and did not create a new crime. The crime of conspiracy is defined only in section 371 of Title 18.").

Second, in contrast to Section 1956(h), the legislative history of Section 846 demonstrates that the drug conspiracy provision was intended not merely to increase the punishment for an existing crime, but also to ensure that "[a] conspiracy to commit violations of [certain existing drug laws] would be considered a specific offense." H.R. Rep. No. 82-635 (1951); S. Rep. No. 82-1051 (1951) (accepting and reproducing House report). Consistent with this express intent, Section 846 appeared in the public laws in a section labeled "*Offenses* and Penalties." Pub. L. No. 91-513, § 406, 84 Stat. 1265 (1970) (emphasis added).[11]

[11] Petitioners' argument is not undercut by references by two members of Congress to Section 846 in proposing earlier conspiracy penalty provisions similar to Section 1956(h). Both Senator Biden, 136 Cong. Rec. S6639 (daily ed. May 21, 1990), and Senator D'Amato, 137 Cong. Rec. S12,235 (daily ed. Aug. 2, 1991), introduced bills that would have amended Section 1956 to add conspiracy provisions substantially similar to the language of Section 1956(h); in introducing these bills, each Senator referred to the statutory penalties for drug conspiracies. Such references should not affect this Court's interpretation of Section 1956(h) for two reasons. First, they were made in relation to bills that were not passed. Second, and even more importantly, Senators Biden and D'Amato referred to drug conspiracy statutes solely as an example

(Continued on following page)

That the language in Section 1956(h) is similar to the language of 18 U.S.C. 846 is not dispositive. In *Scarborough* v. *United States*, 431 U.S. 563 (1977), this Court noted that Congress's deliberate use of particular verb tenses in one provision of the Omnibus Crime Control Act did not imply that it had used the same tenses just as deliberately in another provision of the Omnibus Act, particularly when the second provision was "enacted hastily with little discussion." *Id.* at 569. Similarly, in this case, *Shabani*'s conclusion that Congress deliberately drafted the language of Section 846 to omit an overt act requirement, 513 U.S. at 14, does not automatically determine the meaning of Section 1956.

Third, it would be a mistake for this Court to assume that Congress's analysis in enacting Section 1956(h) paralleled this Court's analysis in *Shabani*. *Shabani* was decided two years *after* the passage of Section 1956(h), and members of Congress therefore could not be expected to anticipate its reasoning in pre-*Shabani* debates. Nor, prior to *Shabani*, should Congress have been expected to focus on the two decades-old decisions on which this Court relied in *Shabani* – *Singer* v. *United States*, 323 U.S. 338 (1945), and *Nash* v. *United States*, 229 U.S. 373 (1913). The

of using crime-specific conspiracy statutes to increase penalties for particular conspiracies. *See* 136 Cong. Rec. S6639 (daily ed. May 21, 1990) (statement of Sen. Biden) (describing his proposed provision as "a technical amendment to make consistent the penalty for money laundering conspiracies with *penalties for drug conspiracies*, which carry the same penalty as the offense that is the object of the conspiracy" (emphasis added)); 137 Cong. Rec. S12,235 (daily ed. Aug. 2, 1991) (statement of Sen. D'Amato) (describing his proposed provision as "rais[ing] the penalty for money laundering conspiracy from 5 years to whatever the penalty would be for the substantive offense that was the object of the conspiracy").

members of Congress who considered Section 1956(h) mentioned neither of these cases.

Fourth, this Court observed in *Shabani* that the statutory language failed to "require[] that an overt act be committed to further the conspiracy, and we have not inferred such a requirement from congressional silence in other conspiracy statutes." 513 U.S. at 13. By contrast, with respect to money laundering conspiracies, Congress ratified the majority view that an overt act must be proved when it enacted the money laundering venue provision, 18 U.S.C. 1956(i), in 2001. *See infra* Part III.

Finally, *Shabani*'s bright-line formulary cannot mechanically be applied to conspiracy provisions – like Section 1956(h) – that are subsections of carefully constructed statutory offenses. The *Shabani* formulary only takes into consideration discrete, specific conspiracy statutes. It does not speak to a distinct species of conspiracy statutes: those that are subsections of other specific offenses. Title 18 alone has fifty-nine such subsections.[12]

[12] Conspiracy To Destroy Aircraft or Aircraft Facilities, § 32(a)(7); Conspiracy To Commit Violence Against an Aircraft, § 32(b)(4); Conspiracy To Commit Violence at International Airports, § 37(a); Fraud Conspiracy Involving Aircraft or Space Vehicle Parts, § 38(a)(3); Conspiracy To Influence or Impede a Federal Official, § 115(a)(1)(A); Bribery in Sporting Contest Conspiracy, § 224(a); Conspiracy Involving Chemical Weapons, § 229(a)(2); Conspiracy Involving Street Gangs, § 521(c)(3) and (d)(3)(D); Conspiracy Involving Defense Information, § 793(g); Conspiracy Involving Aid to Foreign Government, § 794(c); Conspiracy Involving Nuclear Materials, § 831(a)(8); Conspiracy Involving Explosive Materials, § 844(m) and (n); Conspiracy Involving Extortionate Extensions of Credit, § 892(a); Conspiracy Involving Collections with Extortionate Means, § 894(a); Firearm Conspiracies, § 924(n) and § 930(c); Conspiracy To Kill, Kidnap, or Maim in a Foreign Country, § 956(a)(1) and (b); Conspiracy Involving Fraud and Access

(Continued on following page)

In determining the meaning of these sections, a court must consider not only the bare meaning of a word like "conspiracy" or "conspires," but also the specific context in which the language is used, and its purpose in the statutory scheme. *See Ratzlaf* v. *United States*, 510 U.S. 135, 141 (1994) (explaining that "willful" is a "word of many meanings" and must be interpreted mindful of the complex of provisions in which it is embedded); *Bailey* v. *United States*, 516 U.S. 137, 145 (1995) (in determining whether

Devices, § 1029(b)(2); Conspiracy Involving Fraud and Electronic Mail, § 1037(a)(5); Conspiracy To Murder, § 1117; Conspiracy To Kidnap, § 1201(c); Conspiracy To Take Hostages, § 1203(a); Conspiracy To Tamper with Consumer Products, § 1365(e); Conspiracy To Harm Law Enforcement Animals, § 1368(a); Conspiracy Involving the Sexual Abuse of Children, § 1466(a) and (b); Conspiracy To Obstruct State or Local Law Enforcement, § 1511(a); Conspiracy Witness Tampering, § 1512(k); Conspiracy Involving Retaliation Against a Witness, § 1513(e); Conspiracy To Kidnap the President or His Staff, § 1751(d); Conspiracy To Enter or Obstruct Offices of the President, § 1752(b); Economic Espionage Conspiracy, § 1831(a)(5); Theft of Trade Secrets Conspiracy, § 1832(a)(5); Racketeering Conspiracy, § 1951(a); Murder for Hire Conspiracy, § 195(a); Violent Crimes in Aid of Racketeering Conspiracy, § 1959(a) and (d); Train Wrecking Conspiracy, § 1992(c); Terrorism on Mass Transit Conspiracy, § 1993(a)(8); Robbery of Controlled Substances Conspiracy, § 2118(d); Destruction of War Material Conspiracy, § 2153; Production of Defective War Material Conspiracy, § 2154(b); Destruction of National Defense Material Conspiracy, § 2155(b); Sexual Exploitation of Children Conspiracy, § 2251(e); Conspiracy Involving Sexual Materials, § 2252(b)(1) and (2); Material Containing Child Pornography Conspiracy, § 2252A(b)(1) and (2); Conspiracy To Commit Violence Against Maritime Navigation, § 2280(a)(1)(h); Conspiracy To Commit Violence Against Maritime Fixed Platforms, § 2281(a)(1)(F); Conspiracy To Commit Homicide, § 2332(b); Conspiracy To Commit Acts of Terrorism, § 2332b(a)(2); Conspiracy To Bomb Public Places, § 2332(f)(a)(2); Conspiracy To Provide Material Support to Terrorist, § 2339B(a)(1); Conspiracy To Finance Terrorism, § 2339C(a)(2); Conspiracy To Commit Torture, § 2340A(c); Conspiracies Affecting Armed Forces, § 2388(b); and Conspiracy Involving the Transportation of Minors, § 2423(e).

petitioner "used" a firearm, it was necessary to consider not only the "bare meaning" of the word "use," but also its "placement and purpose in the statutory scheme"); *Holloway* v. *United States*, 526 U.S. 1, 6 (1999) (similar analysis with respect to the words "with the intent to cause death or serious bodily harm").

For example, some conspiracy statutes, like Section 1956(h), were clearly passed not to change the elements of a conspiracy, but to increase the available penalties. The Conference Report accompanying the Anti-Terrorism and Effective Death Penalty Act of 1996 explained that the Act had created nine new conspiracy offenses[13] for this purpose:

> Adding the conspiracy language to these criminal statutes will enable the Government to prosecute and punish those offenses appropriately. Without a conspiracy element in the statutory language, the Government must rely on title 18, United States Code, section 371, to prosecute conspiracies generally. Section 371 only carries a five year statutory maximum penalty, even if the underlying offense requires a much higher penalty. This section corrects this anomaly.

[13] AEDPA created new conspiracy offenses related to the following substantive crimes: 18 U.S.C. 32 (destruction of aircraft); 18 U.S.C. 37 (violence at airports serving international civil aviation); 18 U.S.C. 115 (violent crimes against former federal officials and family members of current or former federal officials); 18 U.S.C. 175 (prohibitions with respect to biological weapons); 18 U.S.C. 844 (use of explosives); 18 U.S.C. 956 (harming people overseas); 18 U.S.C. 1203 (hostage taking); 18 U.S.C. 2280 (violence against maritime navigation); and 18 U.S.C. 2281 (violence against maritime fixed platforms).

H.R. Rep. 104-383, at 86 (1995). In contrast, there are other sections that carry penalties less severe than a Section 371 conspiracy. *See, e.g.*, 18 U.S.C. 1368(a) (imposing a one-year statutory maximum for harming animals used in law enforcement).

Given the differing language, structure and histories of conspiracy enactments, *Shabani*'s bright-line formulary – convenient as it might be – cannot create a mechanical rule applicable to all statutes.

Nor does this Court's decision in *Salinas* v. *United States*, 522 U.S. 52 (1997), compel the conclusion that Section 1956(h) somehow abandoned the pre-existing overt act requirement. *Salinas* construed the RICO conspiracy provision, 18 U.S.C. 1962(d), to not require proof of an overt act. First, unlike the money laundering statute, the RICO conspiracy provision is set out as one of the four "prohibited activities" in 18 U.S.C. 1962(d) that define – rather than merely punish – RICO offenses, and is not mixed in with the RICO provisions for civil remedies or venue as is the case with Section 1956(h). Second, in *Salinas*, this Court presumed that Congress intended the phrase "to conspire" to have its conventional, common-law meaning, but of course at most, this canon of construction only creates a presumption – a presumption that is clearly undercut by the evidence here of the background assumptions, purpose, and statutory structure of the money laundering conspiracy provision. Like the drug conspiracy statute at issue in *Shabani*, the RICO conspiracy statute was clearly intended to create a substantive offense, rather than simply to change the penalties for a pre-existing conspiracy offense.

III. CONGRESS MANIFESTED ITS INTENT TO REQUIRE PROOF OF AN OVERT ACT IN MONEY LAUNDERING CONSPIRACY PROSECUTIONS WHEN IT ENACTED THE MONEY LAUNDERING VENUE PROVISION, 18 U.S.C. 1956(i).

Congress's enactment of a new venue provision for money laundering cases, 18 U.S.C. 1956(i), reinforces the conclusion that Section 1956(h) requires proof of an overt act. Congress passed Section 1956(i) in 2001, Pub. L. No. 107-56, § 1004, 115 Stat. 392, in response to *United States* v. *Cabrales*, 524 U.S. 1, 6 (1998), in which this Court held that Missouri was not the proper venue for Cabrales's prosecution for money laundering offenses, even though the underlying illegal activity that generated the funds occurred in Missouri, when all of the proscribed financial transactions took place in Florida. *Id.* at 6. In the aftermath of *Cabrales*, legislation was introduced in both houses of Congress to adopt this Court's suggestion, *id.* at 8, that venue might be proper in the district where the specified unlawful activity occurred, if the defendant transported or played a role in the transfer of the money from that district to the district where the funds were to be laundered. *See* The Money Laundering Deterrence Act of 1998, H.R. 4005, 105th Cong.; The Laundering Enforcement and Combating Drugs in Prisons Act of 1998, S. 2011, 105th Cong.; The 21st Century Law Enforcement, Crime Prevention and Victims Assistance Act, S. 16, 107th Cong. (2001).

Congress subsequently enacted a money laundering venue provision as part of the USA PATRIOT Act.[14] Codified at 18 U.S.C. 1956(i), it provides:

> (1) Except as provided in paragraph (2), a prosecution for an offense under this section or section 1957 may be brought in –
>
> (A) any district in which the financial or monetary transaction was conducted; or
>
> (B) any district where a prosecution for the underlying specified unlawful activity could be brought, if the defendant participated in the transfer of the proceeds of the specified unlawful activity from that district to the district where the financial or monetary transaction is conducted.
>
> (2) A prosecution for an attempt or conspiracy offense under this section or section 1957 may be brought in the district where venue would lie for the completed offense under paragraph (1), or in any other district where an act in furtherance of the attempt or conspiracy took place.
>
> (3) For purposes of this section, a transfer of funds from 1 place to another, by wire, or any other means, shall constitute a single, continuing transaction. Any person who conducts (as that term is defined in subsection (c)(2)) any portion of the transaction may be charged in any district in which the transaction takes place.

[14] Pub. L. No. 107-56, 115 Stat. 308, 392 (Oct. 26, 2001).

When this venue subsection was enacted, the overwhelming majority of the courts of appeals that had considered the question had interpreted Section 1956(h) to require proof of an overt act. *See, e.g.*, *United States* v. *Navarro*, 145 F.3d 580, 593 (CA3 1993); *United States* v. *Conley*, 37 F.3d 970 (CA3 1994); *United States* v. *Wilson*, 249 F.3d 366, 379 (CA5 2001); *United States* v. *Pettigrew*, 77 F.3d 1500, 1519 (CA5 1996); *United States* v. *Ross*, 190 F.3d 446, 450 (CA6), cert. denied, 528 U.S. 1033 (1999); *United States* v. *Lee*, 991 F.2d 343, 348 (CA6 1993); *United States* v. *Emerson*, 128 F.3d 557, 561 (CA7 1997) (citing *United States* v. *Rodriguez*, 53 F.3d 1439, 1444 (CA7 1995)); *United States* v. *Hildebrand*, 152 F.3d 756, 762 (CA8), cert. denied, 525 U.S. 1033 (1998); *United States* v. *Evans*, 272 F.3d 1069, 1082 (CA8 2001), cert. denied, 535 U.S. 1029 (2002). The lone exception was apparently the Ninth Circuit, *see United States* v. *Tam*, 240 F.3d 797 (CA9 2001). Far from taking the opportunity to disapprove this majority rule, by amending Section 1956(h) or otherwise,[15] Congress instead implicitly relied on the majority view that money laundering conspiracies require proof of an

[15] Between the passage of the Annunzio-Wylie Act in 1992 and the USA PATRIOT Act in 2001, Congress enacted several other changes relating to the money laundering laws. Pub. L. No. 103-325, 108 Stat. 2243 (1994), made clerical corrections to Sections 1956 and 1957; Pub. L. No. 104-132, 110 Stat. 1301 (1996), added terrorism offenses to the list of specified unlawful activities; Pub. L. No. 104-191, 110 Stat. 2018 (1996), added health-care offenses to the list of specified unlawful activities; Pub. L. No. 104-294, 110 Stat. 3499 (1996), made clerical corrections to Section 1956; and Pub. L. No. 106-569, 114 Stat. 3018 (2000), added to the category of specified unlawful activities covered by the money laundering laws any violation of Section 543(a)(1) of the Housing Act of 1949 related to "equity skimming." Congress had the opportunity to amend Section 1956(h) to expressly do away with the overt act requirement on these occasions as well but declined to do so.

overt act by incorporating the overt act element into the venue provision. Under Section 1956(i)(2), conspiracy offenses may be prosecuted where either (1) the completed money laundering offense could be prosecuted, or (2) "*where an act in furtherance of the conspiracy took place*," precisely the language that is used to refer to overt acts. By using language in the venue provision that presupposes the commission of an overt act, Congress reaffirmed its intent to retain the overt act requirement in money laundering conspiracy prosecutions. Otherwise, if Congress thought it had already eliminated the overt act requirement, then, as it has done in numerous other statutes, it would have simply authorized a money laundering prosecution in the district where the proscribed activity occurred, *i.e.*, where the unlawful agreement was reached. *Cf.* 18 U.S.C. 1512(i) (venue for tampering with a witness may lie "in the district *in which the conduct constituting the alleged offense occurred*") (emphasis added); 18 U.S.C. 1752(c) (venue for prosecutions for conspiracy to obstruct or impede temporary presidential residences and offices lies in "*the place where the offense occurred*") (emphasis added); 18 U.S.C. 3235 (venue in capital cases lie "*where the offense was committed*") (emphasis added).

If in enacting Section 1956(h) Congress intended to eliminate the overt act requirement from money laundering conspiracies, it would not have made an about-face almost ten years later by re-imposing that requirement for venue purposes. Congress's failure to explicitly disapprove the long-standing majority rule requiring an overt act in a prosecution for a money laundering conspiracy under Section 1956(h) is telling: "[P]rolonged congressional silence in response to a settled interpretation of a federal

statute provides powerful support for maintaining the status quo. * * * In a contest between the dictionary and the doctrine of stare decisis, the latter clearly wins." *Hibbs* v. *Winn*, 124 S. Ct. 2276, 2292 (2004) (Stevens, J., concurring). Similarly, "Congress is unlikely to intend any radical departures from past practice without making a point of saying so." *Jones* v. *United States*, 526 U.S. 227, 234 (1999); *see also Taylor* v. *United States*, 495 U.S. 575, 590 (1990) (even the deletion of a pre-existing definition from a new version of the burglary statute was insufficient evidence of Congress's intent to repeal that definition of burglary, where there was nothing in the legislative history to show that was Congress's intent).

IV. REQUIRING AN OVERT ACT FOR MONEY LAUNDERING CONSPIRACY PROSECUTIONS SERVES IMPORTANT GOALS WHILE NOT INHIBITING MERITORIOUS PROSECUTIONS.

The distinctive nature of money-laundering-related offenses provides an important policy reason for requiring proof of an overt act in money laundering conspiracy prosecutions. Put simply, a contrary result gives prosecutors a tool for rewriting the penalty structure of the federal criminal code by permitting them to treat a wide range of offenses as crimes with a twenty-year maximum sentence regardless of Congress's expressed intent.

Money laundering is a derivative crime: The acts of depositing, withdrawing, and transferring funds are inherently innocuous. What makes money laundering a crime is the *source* of the funds. Only once some underlying criminal activity has taken place and generated economic proceeds are there funds to launder. Money laundering conspiracy is thus a doubly derivative crime: It

involves an agreement to launder funds once a specified unlawful activity has generated those funds. Notably, the specified unlawful activities listed in Section 1956(c)(7) encompass a staggeringly wide range of criminal behavior. Some of the specified activities are extremely serious *malum in se* crimes – for example, using a weapon of mass destruction to kill people (a capital crime under 18 U.S.C. 2332a(a)(3)). Others are entirely regulatory: for example, concealing from the Farmers Home Administration the sale of crops and livestock in which the FmHA holds a security interest (a crime under 18 U.S.C. 658 with a maximum sentence of five years and, with respect to property with a value of less than $1000, a maximum sentence of one year). Given the ever-expanding list of specified unlawful activities in Section 1956(c)(7), it seems accurate to say that a high proportion of economically motivated crimes qualifies for potential prosecution under Sections 1956 and 1957.

Three things are true of the list of specified unlawful activities. First, many of these substantive offenses carry maximum punishments of well under twenty years. *See, e.g.*, 18 U.S.C. 152 (five-year maximum for certain concealments of assets and false statements); 18 U.S.C. 541 (two-year maximum for failing to pay the proper duty on goods coming into the country); 18 U.S.C. 669 (ten-year maximum for embezzling or stealing the funds of a health-care benefit program); 18 U.S.C. 875(d) (two-year maximum for transmitting, with intent to extort, a threat to injure the reputation of a dead person). Second, many of the specified unlawful activities rely on Section 371 for conspiracy prosecutions; as petitioners have already explained, Section 371 both requires proof of an overt act and provides for a maximum penalty of five years. Third,

in a high proportion of situations involving Section 1956(c)(7) specified unlawful activities, if the activity involves more than one actor and the activity succeeds, *someone* will engage in a transaction prohibited by Section 1956 or 1957.

Permitting prosecution for conspiracy to launder money without proof of any overt act permits prosecutors to circumvent two limits that Congress has placed on punishments for various underlying offenses. First, it allows prosecutors to ratchet up dramatically the potential punishment defendants face: Instead of facing a five-year sentence for both the substantive crime and the conspiracy to commit the substantive crime, a defendant who agrees to engage in post-crime financial transactions that fit within Section 1956 faces a twenty-year sentence for the conspiracy alone. This huge potential disparity may face defendants with an almost irresistible pressure to plead guilty. Second, it allows prosecutors to circumvent the overt act requirement of Section 371 by charging money laundering conspiracy in place of (or in addition to) conspiracy to commit the underlying offense.

To be sure, the ratchet would operate even in the presence of an overt act requirement. But at least the overt act requirement would ensure that defendants face draconian punishments only when the finder of fact is sure of their "clear resolve and intent to commit the crime." Paul Marcus, Prosecution and Defense of Criminal Conspiracy Cases § 2.08(3) (1987). That assurance lies beneath the fact that the "great majority" of states have long

required proof of an overt act for any conspiracy, including money laundering conspiracies.[16]

The Government's position, by contrast, creates the possibility that a jury might acquit the defendants of committing the underlying specified illegal activity (for example, because it concludes that the defendants did not in fact conceal the proceeds from selling a cow pledged as security for an FmHA loan); acquit the defendants of conspiracy to commit the underlying specified act (because, for example, it concluded that the defendants never took any step to further their plan to sell the cow); and acquit the defendants of laundering money (because, the illegal sale never having occurred, no funds were generated); but nonetheless convict the defendants of *conspiracy* to launder money because the defendants agreed to sell the cow, conceal the proceeds, and put the concealed proceeds in the bank. That "crime" seems far too inchoate to justify prosecution in a case where the defendants took no action whatsoever with respect to the Section 1956(c)(7) specified activity. And it seems absurd to authorize a twenty-year sentence when there is no real proof of their intention in fact to follow through on their agreement. To be sure, Congress could authorize such a result, but,

---

[16] *See* 2 Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law § 12.2(b) n.[illegible] (2d ed. 2003) (listing state statutes); *cf. Taylor*, 495 U.S. at 598 ("Only a few States retain the common-law definition, or something closely resembling it."). Even states that exempt certain conspiracies from the overt act requirement nevertheless retain the requirement for money laundering conspiracies. *See, e.g.*, Ariz. Rev. Stat. Ann. § 13-1003(A) (West 1978) (exempting only felony upon a person, arson, and burglary); Utah Code Ann. § 76-4-201 (1974) (exempting only capital offenses, felony against a person, arson, burglary, and robbery).

absent some clearly expressed intention, this Court should not presume that it did.

Particularly with respect to such a potentially sweeping statute, this Court should not rely on "prosecutorial discretion" to ensure that a statute does not ensnare those beyond its proper confines. *See Baggett* v. *Bullitt*, 377 U.S. 360, 373 (1964) ("It will not do to say that a prosecutor's sense of fairness and the Constitution would prevent a successful * * * prosecution for some of the activities seemingly embraced within the sweeping statutory definitions."). Results such as this are more properly avoided by construing Section 1956(h) to retain an overt act requirement.

At the same time, there is no evidence that legitimate prosecutions have in any way been stymied by the overt act requirement. On the contrary, the overt act requirement is easily satisfied in every legitimate prosecution because "if the agreement has been established but the object has not been attained, virtually any act will satisfy the overt act requirement." 2 Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law § 12.2(b) (2d ed. 2003), cited in *United States* v. *O'Brien*, 972 F.2d 47, 52 (CA3 1992). An overt act requirement "has seldom materially increased the difficulty of securing convictions for conspiracy." *Developments in the Law of Criminal Conspiracy*, 72 Harv. L. Rev. 922, 946 (1959). In those jurisdictions that have required proof of an overt act for convictions under Section 1956(h), the courts have regularly rejected challenges to the sufficiency of the evidence to establish an overt act when an overt act was alleged and proved. *See, e.g.*, *United States* v. *Evans*, 272 F.3d 1069, 1082-83 (CA8 2001); *United States* v. *Godwin*, 272 F.3d 659, 669 (CA4 2001); *United States* v. *Ross*, 190 F.3d

446, 450-51 (CA6 1999); *United States* v. *Hildebrand*, 152 F.3d 756, 762 (CA8 1998); *United States* v. *Emerson*, 128 F.3d 557, 561-62 (CA7 1997).

Considering both the important purpose served by the overt act requirement and the lack of any evidence that this requirement inhibits legitimate law enforcement, the majority interpretation of Section 1956(h) is correct and should not be disturbed.

V. ANY AMBIGUITY IN SECTION 1956(h) SHOULD TRIGGER THE RULE OF LENITY AND INCORPORATE THE COMMISSION OF AN OVERT ACT AS AN ESSENTIAL ELEMENT IN A PROSECUTION FOR CONSPIRACY TO COMMIT MONEY LAUNDERING.

To be sure, viewed out of context and in a vacuum, "conspires" could support a common-law definition of conspiracy, not requiring the commission of an overt act in furtherance of the conspiracy's objective. But money laundering conspiracies did not exist at common law. *See United States* v. *Wells*, 519 U.S. 482, 491 (1997) ("We do, of course, presume that Congress incorporates the common-law meaning of the terms it uses *if* those terms * * * have accumulated settled meaning under * * * the common law.") (emphasis supplied, internal quotation marks omitted). Certainly Congress's silence about the overt act requirement in Section 1956(h) should not be interpreted as an implicit decision to reinstate the common-law definition of conspiracy when it applies to money laundering, particularly in light of the fact that the lower courts had been adjudicating money laundering prosecutions under Section 371, which clearly does have an overt act requirement. This Court has made clear that the common

law does not automatically determine a statute's meaning. *Id.* at 491 n.10 (1997) ("[W]e disagree with our colleague's apparent view that any term that is an element of a common-law crime carries with it every other aspect of that common-law crime when the term is used in a statute * * * [O]ur rule on imputing common-law meaning to statutory terms does not sweep so broadly."). Here, there is simply no indication in the legislative history that Congress even considered reinstating the substantive elements of the common-law definition of conspiracy. Furthermore, in *Taylor* this Court rejected the common-law definition of "burglary" in favor of the well-established pre-existing definition, even though that definition had actually been deleted from the statute at issue. 495 U.S. at 592-93. Similarly, Congress's silence here should not be interpreted as resurrecting the common-law definition of conspiracy when that definition has had no role in the money laundering arena, whether in federal or state courts.[17] *Cf. Taylor*, 495 U.S. at 598 ("Only a few States retain the common-law definition, or something closely resembling it."); *Perrin v. United States*, 444 U.S. 37, 45 (1979) ("[B]y 1961 the common understanding and meaning of 'bribery' had extended beyond its early common-law definitions.").

In contrast to the government's common-law gloss on Section 1956(h), an equally plausible and arguably more compelling interpretation requires the commission of an overt act, considering the statutory scheme and unequivocal legislative history. Money laundering is a construct of the twentieth century, and a conspiracy to commit money laundering is a statutory offense. Like the general statutory

[17] *See supra* note 16.

offense for conspiracy, 18 U.S.C. 371, a money laundering conspiracy should require proof of an overt act. Herein lies the ambiguity, and thus the need for the Rule of Lenity.

This Court has consistently recognized that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Liparota* v. *United States*, 471 U.S. 419, 427 (1985) (quoting *Rewis* v. *United States*, 401 U.S. 808, 812 (1971)). In *United States* v. *Granderson*, 511 U.S. 39 (1994), at issue was the meaning of the term "original sentence" in 18 U.S.C. 3565. Since the phrase was not defined or modified in any way, and its plain meaning would lead to an absurd sentencing result, the Court turned to the statute's purpose and legislative history before concluding that "where the text, structure, and statutory history fail to establish that the Government's position is *unambiguously* correct, the rule of lenity operates to resolve the statutory ambiguity in Granderson's favor." *Id.* at 54 (emphasis added). Here, the rule of lenity must operate to resolve any statutory ambiguity in petitioners' favor and require the commission of an overt act in money laundering conspiracy prosecutions.

CONCLUSION

For the foregoing reasons, the judgment of the Eleventh Circuit should be reversed.

Respectfully submitted,

RICHARD WARE LEVITT
Counsel of Record – Whitfield
LAW OFFICES OF
RICHARD LEVITT
148 East 78th Street
New York, NY 10021
(212) 737-0400

SHARON C. SAMEK
Counsel of Record – Hall
LAW OFFICES OF
SHARON SAMEK
8766 Ashworth Drive
Tampa, FL 33647
(813) 973-0260

THOMAS C. GOLDSTEIN
AMY HOWE
GOLDSTEIN & HOWE, P.C.
4607 Asbury Place, NW
Washington, DC 20016

PAMELA S. KARLAN
559 Nathan Abbott Way
Stanford, CA 94305